No. 43695-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES ROBINSON

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR LEWIS COUNTY

BRIEF OF APPELLANT

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A ASSIGNMENT OF ERROR

Instruction 6, the "to-convict" instruction, omitted an essential element of the offense of possession of cocaine.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. Thus, the jury must be instructed on each fact which increases the defendant's sentence. The type of controlled substance a person possesses is an essential element of the crime because it determines the penalty to which a person is exposed. Did the absence of "cocaine" from the Instruction 6 violate Mr. Robinson's right to due process?

C. STATEMENT OF THE CASE

During a safety pat down search incident to an investigation, officer Butcher found a glass pipe in Mr. Robinson's coat pocket. RP 89. The crime analysis of the residue found on a piece of wire in the pipe tested positive for cocaine. RP 70, 74.

Bail Jumping

Over defense objections on hearsay grounds, the state filed clerk's minutes, a bench warrant and prior drug convictions to establish that Mr. Robinson knew that he was required to appear in

court. RP 77-80; Ex 3-6??. The state did not however establish that Mr. Robinson signed any of the documents indicating he was aware of the need to return to court on a certain date. RP 81-83.

Jury Instructions

The defense objected to the to-convict instruction for possession of a controlled substance for failing to identify the specific drug. RP 84. The court denied the objection noting that a different instruction named the drug: cocaine. RP 84. Mr. Robinson was found guilty of possession of cocaine and bail jumping. He was sentenced to felony term for the controlled substance verdict. CP 43-52. This timely appeal follows. CP 54-64

D. ARGUMENT

INSTRUCTION 6 OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

The trial court instructed the jury:

> To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about April 2, 2011, the defendant possessed a controlled substance; and
>
> (2) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a credit of guilty.

> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of the these elements, then it will be your duty to return a verdict of not guilty.

CP 9-26 (instruction #6).

1. The To-Convict Instruction Violates Mr. Robinson's Due Process Because it Omitted an Element of The Crime Charged: The Identification of the Controlled Substance.

The "to-convict" instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002))State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions.

Smith, 131 Wn.2d at 262-63. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." Smith, 131 Wn.2d at 263.

Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of an element from the to-convict instruction "obviously affect[s] a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict." State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). This Court reviews a challenged jury instruction de novo. DeRyke, 149 Wn.2d at 910, 73.

2. The To-Convict Instruction Violated Mr. Robinson's Right to Due Process Because it Omitted the Element of Cocaine.

> Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

State v. Williams-Walker, 167 Wn.2d 889, at 897, 225 P.3d 913 (2010), (quoting State v. Frazier, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972)).

The to-convict instruction allowed the jury to find Mr. Robinson guilty if it determined he delivered any controlled substance; the to-convict instruction did not mention the specific drug at all. CP 9-26. The to-convict instruction was constitutionally deficient, because cocaine is an element of the crime. See State v. Goodman, 150 Wn.2d 774, 778, 83 P.3d 410 (2004).

In Goodman, the Court held, "When the identity of the controlled substance increases the statutory maximum sentence ... which the defendant may face upon conviction, that identity is an essential element of the crime." Id. This is because "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." Id. at 785 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

Possession of a controlled substance, marijuana, could be punished as a gross misdemeanor with up to one year of confinement, unless the jury finds the person possessed more than

40 grams in which case it is a felony. RCW 69.50.4014[1]. Or a conviction for possession of other controlled substances could yield a sentence of up to 60 months regardless of the amount possessed. RCW 69.50.4013[2].

This Court has recognized that if the identity of the substance changes the standard range to which the defendant is subjected, the identity of the drug is an element that must be submitted to the jury. State v. Evans, 129 Wn.App. 211, 229 n.15, 118 P.3d 419 (2005), reversed on other grounds, 159 Wn.2d 402, 150 P.3d 105 (2007). The judge in Evans sentenced the defendant to 60 months' confinement based on a finding that a particular drug was involved, but it was not clear that the jury premised its convictions on such a finding. Id. at 229. Accordingly, the jury verdict supported a standard range of 12 to 14 months, and the imposition of a 60-month sentence violated the defendant's Sixth Amendment right to a jury trial. Id. at 229 n.15. Similarly, the to-convict instruction here supported only a sentence of up to one

[1] RCW 69.50.4014, Amended by 2012 Wash. Legis. Serv. Init. Meas. 50

[2] RCW 69.50.4013, Amended by 2012 Wash. Legis. Serv. Init. Meas. 50

year as that is the maximum penalty for possession of marijuana.[3] RCW 69.50.401[4].

In Williams-Walker,167 Wn.2d at 919, a firearm enhancement case, the court reviewed three consolidated cases where the trial court imposed a five-year firearm enhancement after the jury was instructed and asked to find by special verdict whether the defendant was armed with a deadly weapon. In two of the cases the defendant was convicted of first degree assault with a firearm, a conviction requiring a finding that a firearm was used. The court held that the trial court erred because it imposed a firearm enhancement without a specific special verdict finding.

The court reasoned that looking to the underlying guilty verdict to support the sentencing enhancement would violate a defendant's right to a jury trial under article 1, sections 21 and 22 of the Washington Constitution, because "[w]here a firearm is used in the commission of a crime, the only way to determine which enhancement is authorized is to look at the jury's special findings. A sentence enhancement must not only be alleged, it also must be

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[3] The instruction would not support a felony possession of marijuana, as the instruction also does not require finding that more than 40 grams of the substance were possessed.

[4] RCW 69.50.4013, Amended by 2012 Wash. Legis. Serv. Init. Meas. 50

authorized by the jury in the form of a special verdict.". Williams-Walker, 167 Wn.2d at 899-900.

Williams-Walker, applied to Mr. Robinson's case, required the state to allege possession of cocaine and also for jury to possession of cocaine. Here, the to-convict instruction failed to require the state to prove possession of cocaine to support the imposition of a felony sentence. Even though juries are not required to look to other instructions to find missing elements in the to-convict instruction, here the other instructions would not have provided the missing element. Smith, 131 Wn.2d at 262-63.

The other instructions merely indicated that "it is a crime to possess a controlled substance" and "cocaine is a controlled substance". CP 9-26 (instructions # 5 and #7). Even when read together these instructions only permitted the jury to find that Mr. Robinson possessed any controlled substance. Under the analysis in Williams-Walker, the to-convict instruction here was constitutionally deficient because it omitted an essential element that increased the penalty and violated Mr. Robinson's right to a jury trial under article 1, sections 21 and 22.

3. Reversal is required.

The United States Supreme Court has held that under the federal constitution, harmless error analysis applies where the trial court omits an element from the to-convict instruction. Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). But our state constitutional right to a jury trial is stronger, requiring automatic reversal where the court omits an element from the to-convict instruction.

Article I, section 21 provides that "[t]he right of trial by jury shall remain inviolate." Const. Art. I, § 21. There is no equivalent federal provision, and therefore our supreme court has repeatedly held that the state constitution provides a stronger right to a jury trial than the United States Constitution. E.g. State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); Sofie v. Fibreboard, 112 Wn.2d 636, 771 P.2d 711 (1989); Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982).

Furthermore, in looking to the law regarding the specific issue raised here, our state courts have required automatic reversal for this type of error for over 100 years. In 1890, during our first year of statehood, the supreme court held in McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890), that the omission of an element from what we would now call the to-convict instruction required

reversal. The court noted that a problem with a definitional instruction could possibly be considered harmless in light of other instructions, but that the omission of an element from the "to convict" instruction required reversal, without any reference to how much evidence was presented on that element or whether the outcome would have been the same with the proper instruction. Id. at 354-55.

Many cases over the next century reaffirmed the rule that automatic reversal is required where the to-convict instruction omits an element. The supreme court so held in the 1953 case of State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953), as well as much later cases like Smith, 131 Wn.2d at 265 ("Failure to instruct on an element of an offense is automatic reversible error"). And this Court as recently as the year 2000 stated, "A harmless error analysis is never applicable to the omission of an essential element of the crime in the 'to convict' instruction. Reversal is required." State v. Pope, 100 Wn.App. 624, 630, 999 P.2d 51 (2000).

Although the Washington Supreme Court has acknowledged Neder as the federal standard, its decisions in State v. Brown, , Recuenco, and most recently Walker,167 Wn.2d at 919, 225 P.2d 913 (2010) indicate that it will not follow that standard under the

Washington Constitution. In 2002, Brown recognized Neder and purported to apply it in that case, but it did not perform an independent state constitutional analysis and it continued to cite prior Washington cases for the proposition that "[a]n instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

More recently in the Recuenco series of cases, the United States Supreme Court held that a Neder harmless-error standard must be applied to Blakely[5] errors because the failure to instruct on an element is indistinguishable from a failure to instruct on a sentence enhancement. Washington v. Recuenco, 548 U.S. 212, 222, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). But on remand, our Supreme Court held that automatic reversal was required under Washington law, because the sentence imposed was not supported by the jury's actual verdict, notwithstanding what a jury might have found if properly instructed. Recuenco, 163 Wn.2d at 441-42. The Court cited Article I, section 21, reiterated that it provides stronger protection than the federal constitution, and stated "our right to a jury trial is no mere procedural formality, but a fundamental

[5] Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

reservation of power in our constitutional structure." Recuenco, 163 Wn.2d at 435. Accordingly, automatic reversal was required.

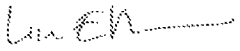
In Williams-Walker, the Court again relied upon the more-protective provisions of the Washington Constitution to conclude harmless-error analysis could not apply where the jury's verdict did not reflect a fact necessary to impose a greater enhancement. Williams-Walker, 167 Wn. 2d at 900.

Here the jury made a finding of possession of a controlled substance rather than possession of cocaine. The judge was bound by that finding. Williams-Walker, 167 Wn. 2d at 901-902. When the judge determined that the controlled substance was cocaine, he exceeded the authority authorized by the jury findings creating "error" "that can never be harmless." Williams-Walker, 167 Wn. 2d at 901-902. For these reasons reversal is required.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Robinson's conviction and remand his case for a new trial.

Respectfully submitted this 20th day of November 2012.



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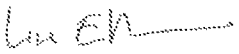

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